Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term

No. 76-32

CITY OF BRAINERD, et al.,

Appellants,

vs.

MINNESOTA STATE BOARD OF HEALTH,
by WARREN R. LAWSON, M.D.,

Appellee.

JURISDICTION STATEMENT

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Appellee.

JURISDICTION STATEMENT

Come now the aforesaid Appellants, and show this honorable Court the following Matters concerning the above entitled Appeal, pursuant to Rule 15 of the Rules of the United States Supreme Court, effective July 1, 1970:

A. DECISION BELOW

This appeal is taken from the decision of the Minnesota Supreme Court in *State Board v. Brainerd*, 241 N.W. 2d 624 (Minn. 1976). The decision was filed on March 26, 1976, Case No. 45644, Docket No. 319. The same is reprinted as Appendix I, *infra*. A petition for rehearing was filed on April 8, 1976, pursuant to leave of the Chief Justice of the Minnesota Supreme Court, and denied by order of May 4, 1976, which is reprinted as Appendix II, *infra*. Rule 140 of the Minnesota Rules of Civil Appellate Procedure pro-

vides, "The filing of a petition for rehearing stays the entry of judgment until disposition of such petition." Entry of final judgment was delayed, however, until May 20, 1976, to permit taxation of costs.

B. JURISDICTIONAL GROUNDS

(i) This is an appeal from a judgment of the Minnesota Supreme Court which sustains the validity of Minnesota Statutes, Section 144.145, Chapter 603 of Minnesota Laws of 1967, including regulations pursuant thereto, under Amendment XIV, Section 1, and Article IV, Section 4 of the United States Constitution.

(ii) The effective date of judgment is May 20, 1976. See Part A of this Statement, *supra.*

(iii) Title 28, United States Code, Section 1257 (2) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be received by the Supreme Court as follows: . . . (2) By appeal, where is drawn into question the validity of a statute of any State on the grounds of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity.

Title 28, United States Supreme Court, Section 2106 provides:

> The Supreme Court . . . may affirm, modify, vacate, set aside, or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(iv) It is acknowledged that appeal must be based upon a substantial federal question. *Zucht v. King,* 260 U.S. 174 (1922).

This case presents a difficult and substantial federal constitutional question of privacy, body integrity, and health freedom, as the Minnesota Supreme Court acknowledge in their opinion below. See 241 N.W. 2d at 630-633, 634, including the multitude of authorities there cited.

Among the more important cases on which we rely, most of them very recent, are the following:

Union Pacific Ry. v. Borsford, 141 U.S. 250 (1891). Cf. *Mohr v. Williams,* 95 Minn. 265, 104 N.W. 12 (1905).

Griswold v. Connecticut, 361 U.S. 479 (1965). Cf. *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

Roe v. Wade, 410 US. 113 (1973). Cf. *Doe v. Bolton,* 410 U.S. 179 (1973).

Wesley v. Rossi, 305 F. Supp 706 (D. Minn 1969). Cf. *Breese v. Smith,* 501 P. 2d 159 (Alaska 1972).

Pure Water Committee v. Yoder, 6 Ill. App. 3d 659, 286 N.E. 2d 155 (1972) Cf. *Cincinnati ex rel. Crotty v. Cincinnati,* — Ohio App. 2d— (1976)

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Rutherford v. United States, 399 F. Supp. 1208 (W.D. Okla. 1975).

Price v. Sheppard, 239 N.W. 2d 905 (Minn. 1976).

In re Quinlan, 355 A. 2d 647 (N.J. 1976).

(v) The state law sustained in this case, against challenge under federal constitutional provisions, is Minnesota Statutes, Section 144.45, Chapter 603 of Minnesota Laws of 1967, the text of which is set forth in Appendix II, *infra.* The statute requires fluoridation of public drinking water of all municipalities of the State. There is no provision for local option to be exercised at any time either by elected representatives or referendum.

C. QUESTIONS PRESENTED

In light of Article IV, Section 4, and Amendment XIV, Section 1 of the United States Constitution:

1. Does a state government have power by statute, which makes no provision for local option, to require that citizens submit to adulteration of their drinking water with a toxic substance, viz., sodium fluoride, where the record shows (1) that the claimed dental health benefits of fluoridation are doubted and controverted by a sizeable part of the world scientific community; (2) that fluoridation appears to be carcinogenic and otherwise unsafe to public health, in view of abundant, new scientific evidence; (3) that fluoridation is neither intended nor necessary to prevent contagious disease; (4) that less inclusive means of providing fluoride to individuals are readily available; (5) that the community in question is willing to provide free fluoride tablets under medical supervision to individuals who may benefit; and (6) that the people of the community in question have expressly protested to fluoridation in the face of attempted compulsion, by an overwhelming margin of more than nine to one in a special election, and proclamation of a convention of delegates chosen by them for that purpose?

2. In other words, do the people have an inherent constitutional right of privacy, health freedom, and body integrity to refuse fluoridation, or any form of medication, which is neither intended nor necessary to prevent contagious disease, or the like, and of which the safety and benefits are controverted by a sizeabe portion of the world scientific community? Note, as shall be demonstrated in Part E hereof, the question is not one of police power.

3. A subsidiary issue of judicial notice is presented: Where the constitutionality of a compulsory health regulation is called into question, may a court judicially notice scientific evidence of the safety and benefits of the required measure at the time the statute was passed, yet refuse judicial notice of subsequent, and more recent scientific evidence showing the dangers and inefficacy of such measure, the existence of which scientific evidence is admitted on the face of the pleadings making up the record of the case?

D. STATEMENT OF THE CASE

In order to appreciate this case more fully, the relevant parts of the procedural history of three cases heard in the Minnesota District Court for Crow Wing County, and the appeal from the third case to the Minnesota Supreme Court, followed by appeal to this Court, are hereafter set forth. For this purpose, Minnesotans Opposed to Force Fluoridation, Inc., a private, non-profit corporation, is designated as "MOFF." The City of Brainerd, Minnesota, including magistrates thereof, is designated "the City" or "Brainerd." And the Minnesota State Board of Health, an administrative agency, is designated as the "State Board."

1. *MOFF v. State Board & Brainerd*
   Minnesota District Court
   Crow Wing County, No. 37168

This was a private suit in equity to enjoin fluoridation pursuant to Section 144.145 of Minnesota Statutes on the claim that compulsory fluoridation was an unlawful exercise of state police power.

October 5, 1973—Hon. Gordon MacRae, District Judge, after hearing of then available scientific evidence, found that the plaintiff failed to prove that fluoridation was unsafe or ineffective, and that, thereore, the statute was not unconstitutional as an arbitrary exercise of state police power. Accordingly, Judge McRae denied the prohibitory injunction. No appeal was taken.

2. *State Board v. Brainerd*
Minnesota District Court
Crow Wing County, No. 38094

This was a suit at common law for writ of mandamus to compel fluoridation pursuant to Section 144.145 of Minnesota Statutes over public protest and claim of unlawful invasion of privacy, body integrity, and health freedom.

1. June 3, 1974—After refusal to comply with several requests of the State Board to fluoridate, the Municipal Council of the City resolved to conduct a special election on July 3, 1974, to determine whether the People wished fluoridation or not, and whether a Convention of the People should be constituted, etc.

2. June 13, 1974—The State Board resolved to compel fluoridation of the municipal water supply of the City by suit for writ of mandamus.

3. July 2, 1974—The State Board filed a petition for peremptory write of mandamus against the City.

4. July 3, 1974—Special election conducted. The People of the City voted against fluoridation by vote of 1863 to 199, and in favor of the Convention by vote of 1697 to 325.

5. July 5, 1974—Pursuant to electoral authority the Brainerd Convention, consisting of ballot-designated delegates, met, deliberated, and declared the compulsory fluoridation statute to be an unconstitutional invasion of individual rights of the People to privacy, body integrity, and health freedom.

6. July 11, 1974, 10 a.m.—The Brainerd Convention formally promulgated a set of Resolves, which were duly served on the Governor, the Speaker of the House of Representatives, the President of the Senate, and the Chief Justice of the State.

7. July 11, 1974, 2 p.m.—Hon. John Spellacy, District Judge, denied a peremptory writ, but allowed an alternative writ of mandamus.

8. July 29, 1974—On the face of the petition, alternative writ, answer, and demurrer, Judge Spellacy dismissed the suit for failure of the State Board to plead the natural fluoride content of the water supply. No appeal was taken.

3. *State Board v. Brainerd*
Minnesota District Court
Crow Wing County, No. 38183

This was a suit at common law for writ of mandamus to compel fluoridation pursuant to Section 144.145 of Minnesota Statutes, over public protest and claim of unlawful invasion of privacy, body integrity, and health freedom.

1. August 29, 1974—The State Board and the City stipulated for issuance of an alternative writ of mandamus on a new petition.

2. September 5, 1974—The State Board filed a petition for alternative writ of mandamus, which alleged, *inter alia,* (1) that Section 144.145 of Minnesota Statutes and regulations thereunder establish that the City has a non-discretionary, ministerial duty to fluoridate; (2) that the statute and regulations were held to be constitutional in *MOFF v. State Board & Brainerd,* C.W.C. No. 37168, so as to bar defense by reason of *res judicata;* (3) that the municipal magistrates had no standing to defend; and (4) that the municipal magistrates had refused official requests to fluoridate.

3. October 10, 1974—Hon. James E. Preece, District Judge granted an alternative writ of mandamus.

4. October 31, 1974—The City filed an answer, which alleged, *inter alia,* (1) that the claimed dental health benefits of fluoridation are doubted and controverted by a sizeable part of the world scientific community; (2) that fluoridation appears to be unsafe when applied to the general population, in view of growing scientific evidence; (3) that fluoridation is neither intended nor necessary to prevent contagious disease; (4) that less intrusive means of providing fluoride are readily available; (5) that the City is willing to provide free fluoride tablets under medical supervision to indivduals who may benefit; and (6) that the People of the City had expressly protested by an overwhelming margin of more than nine to one in a special election, and a proclamation of a convention of delegates chosen by them for that purpose.

5. December 5, 1974—Following demurrer and hearing, Judge Preece granted a peremptory writ of mandamus on the face of the pleadings. In his written opinion, he

held that defense was barred by *res judicata* arising from *MOFF v. State Board & Brainerd,* C.W.C. No. 37168.

6. December 17, 1974—Hearing on the City's motions to vacate the peremptory writ, to take judicial notice of and conduct hearings on new scientific evidence tending to show fluoridation is ineffective and unsafe, and to stay the peremptory writ pending appeal to the Minnesota Supreme Court.

7. December 30, 1974—Judge Preece entered an order denying other motions, but granting stay of the peremptory writ pending appeal to the Minnesota Supreme Court.

8. January 27, 1975—Notice of appeal filed.

On Appeal to the
Minnesota Supreme Court
Case No. 45644

1. November 3, 1975—After exchange of briefs in which the issues were argued, and judicial notice was requested of new scientific evidence against fluoridation available both before and since the prosecution of the appeal, oral argument was heard by the Court sitting *en banc.*

2. March 26, 1976—A majority of the Court per MacLaughlin, J., held (1) that the magistrates of the City had standing to defend in behalf of the People, 241 N.W. 2d at 627-628; (2) that the substantive issue was not barred by *res judicata,* 241 N.W. 2d at 627; (3) that a substantial federal question of constitutional privacy, including body integrity, was involved 241 N.W. 2d at 630-633, 634; and (4) that, notwithstanding the strict constitutional privacy

standard applicable, ~~the state compulsory privacy standard applicable~~ the state compulsory fluoridation law was valid: the majority took judicial notice of the existence of scientific opinion in 1967, when the law was passed, that fluoridation confers a substantial health benefit, and has a negligible impact on the individual, disregarding subsequent scientific evidence to the contrary, which was called to the attention of the Court and admitted on the face of the pleadings, 241 N.W. 2d at 630-633. Yetka, J., dissented and would have taken judicial notice of recent and growing evidence showing dangers of fluoridation and declared the state compulsory fluoridation law to be an unconstitutional invasion of privacy, body integrity, and health freedom, 241 N.W. 2d at 634-635.

3. April 8, 1976—Petition for rehearing filed: the Court was asked to take judicial notice of new scientific evidence, available only after oral argument, showing carcinogenicity of fluoridation.

4. May 4, 1976—Petition for rehearing denied. Appendix III, *infra*.

5. May 11, 1976—Stay of peremptory writ of mandamus pending appeal to the United States Supreme Court granted. MacLaughlin, J., Appendix IV, *infra*.

6. May 20 1976—Final judgment entered. Appendix V, *infra*

7. May 21, 1976—Notice of this appeal filed. Appendix VI, *infra*

E. THE FEDERAL CONSTITUTIONAL QUESTION IS SUBSTANTIAL

1. Since this case falls squarely within 28 U.S.C., Section 1257 (2), the Court must decide whether to accept an appeal, not whether to grant a writ of certiorari. This is of significance because appeal is in form a matter of right, while certiorari is in form a matter of discretion. See United States Constitution, Article III, Section 2, Clause 2. Compare Section 1257 (2) with Section 1257 (3) of Title 28 United States Code; Rule 15(1) (e) with Rule 19(1) (a) of the Rules of the United States Supreme Court. To secure a writ of certiorari to review the decision of a state supreme court, it must be shown that there is a substantial federal question, and that either the question has not before been decided by this Court, or the question was probably decided contrary to the precedents established by this Court. Appeal lies, however, in any authorized case in which a substantial federal question is raised.

A substantial federal question exists where the issue is consequential, difficult, and not clearly resolved by the established precedents of this Court. *Zucht v. King, supra,* 260 U.S. at 176-177.

2. In this case, a state law, making no provision for local option, requires fluoridation of municipal water supplies, and is sought to be enforced by writ of mandamus, over the express election and convention protest of the people of the community whose water supply is to be adulterated, acting as a body politic. The question raised is privacy.

Several appeals to this Court involving the questions of fluoridation have been dismissed. The procedural reasons

are clear enough from an inspection of the specifics. There are two categories of cases represented by these dismissed appeals.

First, there are the private suits in equity to enjoin fluoridation as required by local ordinances. *Ready v. St. Louis County Water Co.*, 352 S.W. 2d 622 (Mo. 1961), appeal dismissed 371 U.S. 8 (1962); *Birnel v. Firecrest*, 53 Wash. 2d 830, 335 P .2d 819 (1959), appeal dismissed 361 U.S. 10 (1959); *Kraus v. Cleveland*, 163 Ohio St. 559, 127 N.E. 2d 605 (1955), appeal dismissed 351 U.S. 935 (1956); *Chapman v. Shreveport*, 225 La. 859, 74 So. 2d 142 (1954), appeal dismissed 348 U.S. 892 (1954). In none of these cases was local option prohibited or excluded by state law. The problem with these and like cases is that the individual plaintiffs had no standing to raise more than the question of whether the local ordinance or statute, as a general proposition, was arguably more reasonable than not, and hence a constitutional exercise of police powers. To secure the desired relief in this situation, an individual plaintiff must plead and prove by clear and convincing evidence that the measure is unsafe or otherwise arbitrary. It is virtually necessary to prove up a public nuisance, since under the usual test of police power, whether derived from substantive due process or elsewhere, a regulation is valid so long as it bears some reasonably arguable relation to public health, safety or welfare. Cf. *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Such a plaintiff could not be heard to claim that the statute interferes with the inherent privacy rights of the individuals living in the community: the reason is that standing to assert those privacy rights, if any there be, belongs to them and them alone. The essence

of standing, or the rule against advisory opinions, is that a court cannot decide abstract questions or issues not supported by concrete facts actually present in the pleadings and evidence of the case; and that, even when a court does adjudicate, the rule of law will not be framed more broadly than required to dispose of the precise facts before the court. See, e.g., Brandeis, J., in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 at 346-348 (1935). In other words, the judiciary has constitutional power to decide only cases and controversies in the strict, technical sense of those words. It follows that, save in extraordinary circumstances not here present, there is no standing to claim that the inherent privacy rights of individuals are violated by a statute, unless and until the statute is about to be enforced against an individual or group of individuals who expressly protest. In all of the aforementioned dismissed appeals, therefore, there was and could have been only a raw question of police power.

This is important, among other things, in that the burden of persuasion against the wisdom of a statute is greater in the ordinary police power case, than in a privacy case. The point is neatly illustrated by the case of *Roe v. Wade*, 410 U.S. 113 (1973), which recognizes the privacy right of a woman to terminate pregnancy in the first few months immediately following conception: if the majority of this court had viewed abortion statutes according to police power standards, the presumption would have favored legislative judgment; but since the majority saw abortion in the early months of pregnancy as a matter of privacy, the presumption favored the individual.

In this case, we have the express protest of the people who must drink the water, registered by election and con-

vention, in the face of an attempt to force compliance with the challenged statute by writ of mandamus. Hence, in this case, we have a question of privacy. And the Minnesota Supreme Court recognized that privacy was the question. The majority noted, first, that ***MOFF v. State Board & Brainerd*** (see Part D, *supra*), which was a private suit to enjoin fluoridation raising a police power question, did not bar the privacy defense in this case by operation of *res judicata;* and secondly, that "At the core of the privacy decisions, in our judgment, is the concept of personal autonomy," etc. MacLaughlin, J., 241 N.W. 2d at 627-631. Cf. Parts 1 and 3 of the Syllabus, 241 N.W. 2d 625-626. Justice Yetka, in dissent, expressed the view that the state fluoridation law is an unconstitutional invasion of privacy, saying in conclusion, "There must be a point at which state action must yield to the asserted rights of the individual. I believe that this point has clearly been reached in this case." 241 N.W. 2d at 635. Thus, we have a sharply divided state supreme court, both relying on the same federal decisions: the majority upheld the state law, while the minority would have struck the statute down. The issue is consequential, because fluoridation affects at least 93,000,000 Americans. The issue is difficult and unresolved by federal cases, because the Minnesota Supreme Court was in profound disagreement, but even then granted a stay of the fluoridation order, over opposition of the State pending this effort. The federal question is therefore substantial. This case falls within 28 U.S.C., Section 1257(2). Hence, appeal lies as a matter of right.

3. We are advised that this Court has recently dismissed appeal (No. 75-1316) in *Canton v. Whitman,* 44 Ohio St. 62 (1975), 96 S. Ct. 1735 (U.S. 1976). There a

state fluoridation law, with provision for local option (which could have been, but was not exercised), was upheld by the Ohio Supreme Court on challenge based essentially on state constitutional guarantees of legal uniformity and local government. It is not difficult for us to perceive why the appeal was dismissed.

There is no right to appeal questions of state constitutional law to this Court.

In the Ohio law, there was a provision for local option by special election of the people, so as to provide freedom of choice, which is the major point of our case. If Section 144.145 of Minnesota Statutes contained a provision for local option, the situation would be much different. In fact, over many years we have lobbied for a local option provision in our state legislature, because our position is that freedom of choice on fluoridation and certain other health questions—such as birth control, *Griswold v. Connecticut,* 361 U.S. 479 (1965); abortion early in pregnancy, *Roe v. Wade, supra;* use of laetrile under medical supervision, *Rutherford v. United States,* 399 F. Supp. 1208 (W.D. Okla. 1975); intrusive psychotherapy, *Price v. Sheppard,* 239 N.W. 2d 905 (Minn. 1976), even death under limited circumstances, *In re Quinlan,* 355 A. 2d 647 (N.J. 1976)—is a matter of constitutional right. It is, in our view, one of those inalienable rights of the individual to "uninterruped enjoyment of his life, his limbs, his body, his health, and his reputation," mentioned by Sir William Blackstone on page 129 of Book I of his *Commentaries on the Laws of England,* hence one of those "customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of the 'Blessings of Liberty' mentioned in the preamble of the Constitution." Douglas, J., in *Doe v. Bolton,* 410 U.S. 179 at 210 (1973).

4. In *Zucht v. King, supra,* the Court dismissed a writ of error to review the federal constitutionality of a state law requiring vaccinations not claimed to be harmful, and both intended and necessary to prevent contagious disease: the question had already been determined in *Jacobson v. Massachusetts,* 197 U.S. 11 (1904). We agree with the result in the latter case.

Our position here, by contrast, is that because fluoridation is neither intended nor necessary to prevent contagious disease, and because respectable scientific authority holds that sodium fluoride in drinking water is carcinogenic, otherwise unsafe for public consumption, and ineffective as a tooth decay preventative, the people have an inherent, federal constitutional right of privacy, body integrity, and health freedom to refuse fluoridation, the same as an individual may refuse a prescription of fluoride tablets. Hence, a unique and distinct question is here presented.

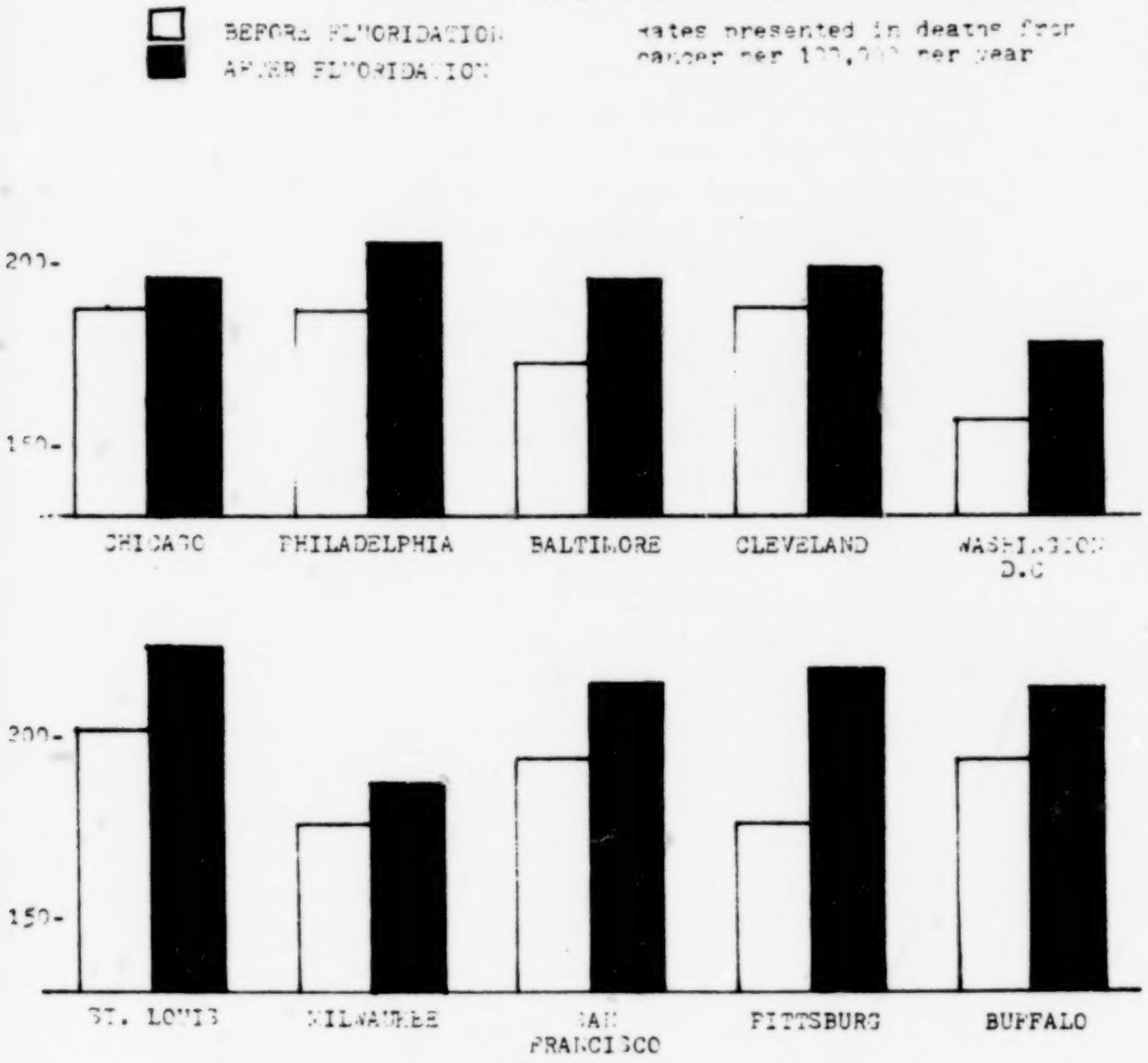
5. In this case below, both Justice MacLaughlin writing for the majority, 241 N.W. 2d at 631, and Justice Yetka, in dissent, 241 N.W. 2d at 634, acknowledged the privacy standard set out in *Price v. Sheppard, supra,* 239 N.W. 2d at 911, which in turn was deduced from decisions of this Court, as follows:

> Our understanding of at least one aspect of the privacy decisions to date is that where the state proposes to intrude into a fundamental decision affecting the conduct of an individual's life, in order to justify that intrusion, it must first demonstrate a legitimate and important state interest. The sufficiency of the interest will be directly dependent on the impact of the decision on the individual's life. And secondly, the means it intends to utilize in serving that interest must, in light of the alternatives, be the least intrusive.

After this point of agreement, the majority and minority disagreed on the issue of what scientific evidence should be judicially noticed as legislative fact. The majority acknowledged our argument that "fluoridation presents a serious public health hazard, and calls to our attention certain scientific studies which indicate the dangers of fluoridation." (sic) 241 N.W. 2d at 629. The bulk of this evidence became available since our 1967 law was passed, much of it only after oral argument in the Minnesota Supreme Court on November 3, 1975. We referred to this material both in our briefs and petition for rehearing.

We point to one illustrative example: It has been known for years that animal experiments in the laboratory reveal cancer-causing properties of fluoride. A. Taylor, *Sodium Fluoride in the Drinking Water of Mice,* 60 Dent. Dig. 170 (1954); Herskowitz & Norton, *Increased Incidence of Melanotic Tumors in Two Strains of Drosoperia Melangaster Following Treatment with Sodium Fluoride,* 48 Genetics 307 (1963); A. & N. C. Taylor, *The Effect of Sodium Fluoride on Tumor Growth,* 119 Proc. Soc, Exptl. Biol. Med. 252 (1965). These findings are possibly, but not necessarily applicable to human populations. Since our appeals from the state district court started, however, important statistical work has become available. The studies of Drs. John Yiamouyiannis and Dean Burk have been placed in the *Congressional Record,* pp. H7172-H7176 (July 21, 1975), and pp. H12732-H12734 (December 16, 1975). These show that cancer death rates in our large cities rise dramaticaly following fluoridation, much faster than in comparable non-fluoridated cities. Because a picture is worth a thousand words, we include three time-trend charts provided to us by Dr. Yiamouyiannis, which graphically represent some of these findings:

Figure 1. Comparison of Cancer Death Rates of Major Metropolitan Areas Before and After Fluoridation (5-year averages; year of fluoridation not included)



Data obtained from "Vital Statistics of the United States" published by the National Center for Health Statistics & "U. S. Census of the Population" published by the U. S. Bureau of the Census.

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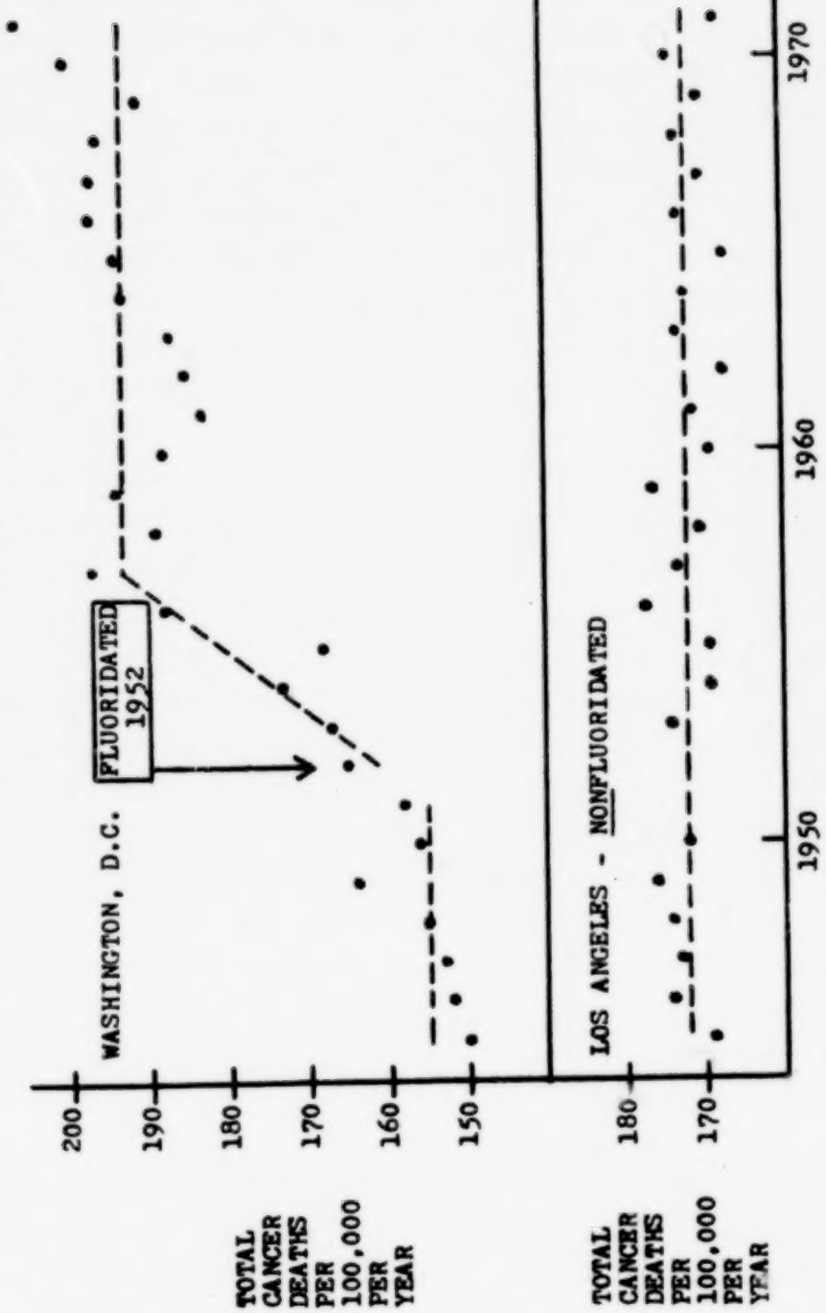
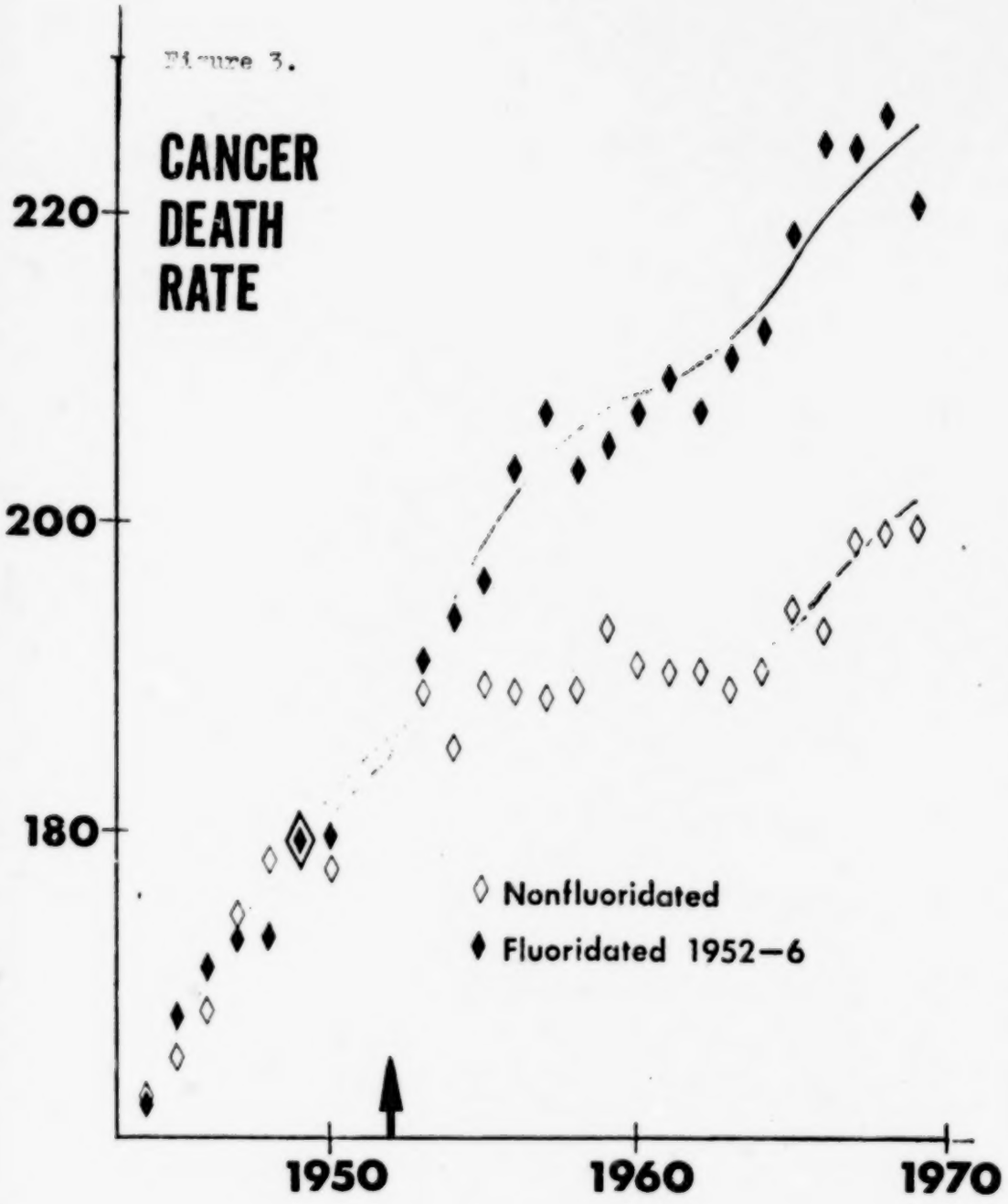
Figure 2. YEAR-BY-YEAR CANCER DEATH RATES (1945-1971)



Data obtained from "Vital Statistics of the United States", published by the National Center for Health Statistics. Data for the city of Los Angeles not available for 1951 and 1952.

Figure 3.



COMPARISON OF THE 10 LARGEST CITIES FLUORIDATED BEFORE 1960: Chicago (1956), Philadelphia (1952), Baltimore (1952), Cleveland (1956), Washington, D.C. (1952), Milwaukee (1953), St. Louis (1955), San Francisco (1952), Pittsburgh (1952-3), and Buffalo (1955)---Total population (as of 1960) of 11,500,703------- WITH THE 10 LARGEST CITIES WITH COMPARABLE CANCER DEATH RATES DURING THE PREFLUORIDATION PERIOD, 1944-1950 AND NOT FLUORIDATED AS OF 1969: Los Angeles, Boston, New Orleans, Seattle, Cincinnati, Atlanta, Kansas City (Mo.), Columbus (O.), Newark, Portland (Ore.)---Total population (as of 1960) of 7,075,560.

We believe these speak for themselves sufficiently to obviate the need for comment. We note that Congressional investigations of these findings, and an attempted government cover-up, are now underway in the House Subcommittee on Labor- HEW Appropriations, Hon. Daniel J. Flood of Pennsylvania, Chairman; and in the House Subcommittee on Intergovernmental Operations, Hon. L. H. Fountain of North Carolina, Chairman.

The majority of the Minnesota Supreme Court refused judicial notice of this vital information, saying (in reference to state legislative deliberations more than nine years ago), "we must accept as factual the legislative determination that fluoride is a safe and effective means of reducing dental caries." 241 N.W. 2d at 630. This is odd, because it tailors judicial notice to suit a preconceived judicial conclusion of constitutionality. It is arbitrary, capricious, and unreasonable to notice outdated evidence for purposes of fashioning a principle of constitutional law, but to refuse notice of new evidence of a vital and contrary nature, the existence of which has been admitted on the face of the pleadings making up the record of the case.

Justice Yetka differed with his brothers on precisely this point, saying (after some of our evidence was called to his attention, but not the above time-trend studies) that "this Court should take judicial notice of the fact that scientists are finding every day that additives, chemical and otherwise, of all sorts are seriously suspect in the rising rate of cancer in the United States." 241 N.W. 2d at 634-635. On the basis of this and other considerations, he concluded that the statute was unconstitutional as an invasion of privacy. The rectitude of Justice Yetka's position is supported by *Pure Water Committee v. Yoder*, 6 Ill. App. 3d 659, 286

N.E. 2d 155 (1972), where it was held that, even in a police power case, new evidence of the dangers of fluoridation opens the door to reconsideration of compulsory ordinances, notwithstanding a prior determination of constitutionality by a higher court. On May 19, 1976, the Ohio Court of Appeals decided the evidence of carcinogenicity just mentioned is so vital and new, that the authority of *Canton v. Whitman, supra,* does not bar reconsideration of constitutionality in a private suit to enjoin fluoridation. *Cincinnati ex rel. Crotty v. Cincinnati,* 1st App. Dist. No. C-76179, — Ohio App. 2d —. It is doubly true that new evidence should be noticed in a privacy case where the presumption favors the individual.

The available animal experiments and statistical time-trend studies are so potent as to make further promotion of fluoridation a form of public health malpractice; but, we call this material to the attention of this Court, as evidence of legislative fact, to illustrate the gravity of the scientific controversy, and to demonstrate the wisdom of protecting health freedom as a matter of constitutional principle. If fluoridation, or any form of medication is not necessary to prevent communicable disease, and if the efficacy and safety thereof are seriously controverted in the scientific community, it should be an inherent constitutional right ~~fluoridation, or any form of medication is not necessary to~~ to refuse the prescription. About twenty years ago, when there was comparatively little evidence against fluoridation, this notion might have seemed too broad in the eyes of some. But now after all these many years, it appears to the astonishment of many, that fluoridation may be one of the largest carcinogenic factors in our national environment: Drs. Burk and Yiamouyiannis estimate that there are 20 to

30 thousand excess cancer deaths in this country per year linked to fluoridation. Hence, the practicality of reasonably generous health freedoms is clear.

Medicine, in the broad sense of all the allied sciences—including dentistry, osteopathy, chiropractic, chiropody, biochemistry, etc.—is a priestly profession. Yet, the greatest men and women of medicine know the limitations of their efforts. Whether the controversy be fluoridation, or any other practice or method of curative or preventative medicine, there must be room for dissent. And where controversy among doctors over the safety and efficacy of a given measure is profound, at least in the absence of threatened or actual epidemic, pollution, or other such emergency, the people must be allowed some degree of free choice sanctified as constitutional liberty. That is the essence of the substantial federal question raised by this appeal.

6. It may be noted that this case entails a collective protest of a whole community acting as a body politic. Still, as the Minnesota Supreme Court recognized below, this consideration does not remove the matter from the sphere of constitutional privacy. In *Griswold v. Connecticut, supra,* a classic in constitutional privacy, it was held that married adults have an inherent constitutional right to practice birth control. There is no individual right to practice birth control for the simple reason that birth control requires the community of a man and a woman. Hence, there are collective rights of privacy. Because fluoridation is a community-wide measure, the right to protest is premised on a collective principle. The protest, which converts this case from a question of police power into a question of privacy, was by public referendum and declaratory convention pleaded in bar to a suit for writ of mandamus

to force compliance. This method was used, because a class action to enjoin fluoridation might not have been available and could not have polled the people of the community. What we have, therefore, is a privacy question of body integrity and health freedom with an interesting twist, making the issue all the more difficult and substantial.

WHEREFORE, the aforesaid Appellants pray that probable jurisdiction be noted, and that this cause be set for written and oral argument in due course.

Respectfully submitted,

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APPENDIX I

MINNESOTA STATE BOARD OF HEALTH,
by WARREN R. LAWSON, M.D.,

Respondent,

vs.

CITY OF BRAINERD, et al,

Appellants.

241 N.W. 2d 624 (Minn., March 26, 1976)

SYLLABUS

1. Appellant city of Brainerd is not barred by doctrine of res judicata where it was only a nominal party in first action and where its duty to affirmatively represent the will of its citizens was subsequently activated by public referendum.

2. Brainerd has standing to challenge constitutionality of a statute where the statute has a specific adverse effect upon the city and involves a question of substantial public interest to its citizens.

3. In light of the substantial public health benefit of fluoridation and its innocuous effect on the individual, fluoridation of the public drinking water is a justified intrusion into an individual's bodily integrity; and, accor-

dingly, we find the Minnesota Fluoridation Law, Minn. St. 144.145, to be constitutional.

4. A governmental subdivision is not a "person" for purposes of the due process clause; and therefore, the fact that fluoridation may require a city to incur expense in remedying, or even replacing, its present filtration system does not afford it a constitutional right to a due process hearing.

Affirmed.

Considered and decided by the court en banc.

OPINION

MacLAUGHLIN, Justice.

The issue on this appeal is whether the appellant city of Brainerd must fluoridate its municipal water supply in compliance with Minn. St. 144.145. The trial court rejected appellants' arguments that the statute is unconstitutional and issued a peremptory writ of mandamus commanding Brainerd to comply with the law. We affirm.

In 1967, the Minnesota Legislature enacted what is commonly referred to as the Minnesota Fluoridation Law, Minn. St. 144.145. The statute required that prior to January 1, 1970,—

> "* * * the person, firm, corporation, or municipality having jurisdiction over a municipal water supply, whether publicly or privately owned or operated, shall control the quantities of fluoride in the water so as to maintain a fluoride content prescribed by the state board of health."

In 1969, the Minnesota State Board of Health adopted regulations which require that the fluoride content of municipal water supplies be maintained at an average concentration of 1.2 milligrams per liter. Minn. Reg. 1969 MHD 112(b) (now Minn. Reg. MHD 138).

In 1972, Minnesotans Opposed to Forced Fluoridation (MOFF), a private nonprofit corporation, sought an injunction against enforcement of the fluoridation statute in the city of Brainerd. The city of Brainerd and the Minnesota State Board of Health were named as defendants. In that action the trial court found the fluoridation law to be a valid exercise of legislative authority which did not violate the constitutional rights of the citizens of the state nor constitute pollution within the meaning of the Environmental Rights Act. The court therefore denied the injunction and no appeal was taken.

After this decision, the Minnesota State Board of Health attempted to persuade Brainerd to fluoridate its water. During this time the city of Brainerd held a special referendum which resulted in a vote of 1,863 to 199 against fluoridation and a vote of 1,697 to 325 in favor of holding a "convention of the people" to "deliberate on the constitutionality of forced fluoridation." The total membership of the "convention of the people" was the mayor, members of the city council, and members of the water and light board of the city of Brainerd. On July 5, 1974, this convention declared § 144.145 and Minn. Reg. 1969 MHD 112(b) to be an unconstitutional invasion of individual rights.

On September 5, 1974, the State Board of Health filed a petition for a writ of mandamus after a previous petition was dismissed for insufficient pleading. Appellants an-

swered the petition, and respondent moved for judgment on the pleadings. On December 5, 1974, the trial court issued a peremptory writ of mandamus. In its memorandum the trial court concluded that appellants were barred by the judgment in the MOFF proceeding from relitigating the validity of the fluoridation law. The trial court further found that the fluoridation law was not nullified by the Brainerd convention, that the city was not etnitled to an administrative hearing prior to fluoridation, and that mandamus was the proper remedy to compel Brainerd to comply with the law. The city of Brainerd and its officials appeal this decision.

1. The major issue raised on this appeal is whether the Minnesota Fluoridation Law is constitutional. However, respondent first questions whether the city of Brainerd may properly raise such a challenge. Respondent contends that Brainerd is barred under the doctrine of res judicata from bringing this action since Brainerd was a party in MOFF v. City of Brainerd and Minnesota State Board of Health, in which the constitutionality of the fluoridation law was upheld. In that case, MOFF sought an injunction against the fluoridation of Brainerd's water supply naming the city of Brainerd as one of the defendants in the action. The trial court denied the injunction, and no appeal was taken. In the current action, the State Board of Health seeks a writ of mandamus to compel the city of Brainerd to fluoridate its water supply pursuant to the statute and regulation. The trial court concluded that Brainerd may not now oppose the fluoridation since it had the "opportunity and * * * incentive" to voice any objection it had in the MOFF proceedings; and even though it failed to do so, it is nevertheless bound by that judgment.

We have observed that res judicata—

> "* * * operates as an absolute bar to a subsequent suit on the same cause of action, concluding the parties and their privies not only as to every matter that was litigated but also as to any other claim or defense which might have been litigated." Howe v. Nelson, 271 Minn. 296, 301, 135 N.W. 2d 687, 691 (1965).

This rule is based upon "considerations of public policy which demand an end to litigation where a party has had a full, free, and untrammeled opportunity to present facts pertinent to a decisive issue." Lustik v. Rankila, 269 Minn. 515, 520, 131 N.W. 2d 741, 745 (1964).

Although it is a close question, we conclude that Brainerd did not have such an opportunity. It must be remembered that Brainerd was merely a nominal party in the first action and appeared solely in its capacity as proprietor of the water supply. Since the first trial, the referendum by the people of Brainerd has activated the city's duty to affirmatively represent the will of its citizens. Had the referendum occurred prior to the time of the first action, Brainerd would certainly have actively taken part in support of MOFF's position for an injunction against compulsory fluoridation of its water supply. While the question is not free from doubt, we have decided, because of the obvious public purpose to be served by a decision of this case on its merits, that Brainerd is not barred by the doctrine of res judicata.[1]

---

[1]Respondent also asserts that appellants' challenge is barred by the doctrine of estoppel by inconsistent position. However, the doctrine of estoppel by inconsistent position does not apply to the facts of this case. The rule prohibiting the shifting of position "rests largely upon the principle that it results in prejudce to the party who acquiesces in

2. Respondent also argues that appellant city of Brainerd, as a public body acting through public officials, is without standing to challenge the constitutionality of the fluoridation statute. In State ex. rel. Clinton Falls Nursery Co. v. County of Steele, 181 Minn. 427, 430, 232 N.W. 737, 738 (1930), we stated:

> "* * * The better doctrine supported by the weight of authority is that [a public] official so charged with the performance of a ministerial duty will not be allowed to question the constitutionality of such a law. * * * Officials acting ministerially are not clothed with judicial authority. To permit them to refuse to perform their duty on the ground that the commanding law is unconstitutional would be a dangerous practice in that they who have only ministerial duties would be raising questions affecting the rights of third persons while they themselves would have no direct interest in the question and could not in any event be made responsible."

---

the position first taken." Friend v. Friend, 158 Minn. 31, 38, 196 N. W. 814, 817 (1924). See, also, Behrens v. Kruse, 121 Minn. 90, 98, 140 N. W. 339, 342 (1913). In addition, allowing a party to shift position may also mislead the court. Friend v. Friend, *supra*. As this court concluded in Moquist v. Chapel, 62 Minn. 258, 260, 64 N. W. 567, 568 (1895), "[h]aving submitted his case upon one theory of the law and facts, a party cannot complain if it is correctly decided according to that theory, or be afterwards heard to say, if some other theory had been presented, it should have been decided differently."

Thus, the doctrine is primarily concerned with ensuring fair trial tactics within a single litigation. In any case, respondent has not even attempted to show how it has been led to change its position for the worse by any act of appellants or how the court has been misled. In sum, the doctrine of estoppel by inconsistent position is simply not applicable to the instant case.

However, we added (181 Minn. 431, 232 N.W. 738):

> "There is found among the authorities a well recognized exception to the foregoing rule when the rights of the state or the public interest are involved."

See, also, Elwell v. County of Hennepin, 301 Minn. 63, 221 N.W. 2d 538 (1974).

In Commr. of Taxation v. Crow Wing County, 275 Minn. 9, 13, 144 N.W. 2d 717, 719 (1966), we recognized a second exception:

> "* * * In our view the interest required to give standing to a political subdivision must be one predicated upon some adverse effect upon the governmental unit."

See, also, Village of Burnsville v. Onischuk, 301 Minn. 137, 222 N.W. 2d 523 (1974).

We hold that the city of Brainerd has standing to challenge the constitutionality of the fluoridation law under either of the above two exceptions. First the question of fluoridating the drinking water of Brainerd involves a question of substantial public interest to the people of Brainerd. In view of Brainerd's overall responsibility for providing safe and satisfactory water to its citizens, it is proper that the city have standing to challenge the statue in the public interest. Second, it is alleged by Brainerd that the fluoridation statute has a specific adverse effect upon the city of Brainerd in that it threatens to destroy the city's water filtration system. Thus, Brainerd, in its capacity as proprietor of the water supply, as a very specifice and concrete interest in challenging the validity of the

statute. Finally, it must be remembered that the standing doctrine is primarily designed to guarantee that there is a sufficient case or controversy between the parties so that the issue is properly and competently presented to the court. It is clear that appellants have vigorously and competently presented the issue to this court. Consequently, "[a]t this stage of the litigation it would be a great disservice to the public to decline jurisdiction because the [appellants'] standing is somewhat doubtful." Village of Burnsville v. Onischuk, 301 Minn. 137, 143, 222 N.W. 2d 523, 527.

3. Before considering appellants' arguments concerning the constitutionality of fluoridation, it is important to understand the factual background of fluoridation. For this purpose we quote at length from the trial court's memorandum in MOFF v. City of Brainerd and Minnesota State Board of Health:

> "Fluoride, the substance in question, is the ion of the element fluorine. It is never found in nature in an isolated form but always in association with other elements, most commonly with calcium. Fluoride is found in all minerals, rocks and soil; it is present in all foods and water consumed by human beings. The addition of fluoride to drinking water, at least in the amounts here contemplated, affects neither the color nor the taste of the water. Fluoride, in common with many other substances such as oxygen, ordinary table salt, vitamin A and vitamin B is toxic when ingested in relatively large amounts. The natural drinking waters of this country vary in fluoride content from a barely discernible trace up to about 15 milligrams per

> liter or, as it is otherwise expressed, up to about 15 parts per million (ppm). * * *
>
> "In an effort to determine the cause of mottled enamel observed on the teeth of children and adults in certain communities, studies were begun about 70 years ago which ultimately established that an excessive amount of natural fluoride in the drinking water consumed by the residents of said communities caused such mottling, thereafter described as dental fluorosis. During the course of these studies it was observed that these mottled teeth, while cosmetically undesirable in some instances, were otherwise sound and were less susceptible to decay. Without detailing the various studies made, it can be said that by 1945 there was good cause to believe that the addition of fluoride in an amount varying from 1 to 1.5 ppm to water supplies being consumed by children would serve to reduce the incidence of dental decay in said children without serious cosmetic effects by reason of dental fluorosis. Beginning in 1945 and continuing to date municipalities and states have been acting to fluoridate municipal water supplies by the addition of fluoride in amounts up to 1.5 ppm. The studies which were begun in the 1930's to determine the effect of fluoride on teeth have continued to date and have established beyond any serious question that persons who use waters containing 1.0 to 1.5 ppm of fluoride, either naturally or artificially, from infancy to the age of 10 or 12 years have significantly fewer dental caries in their permanent teeth and without dental fluorosis to an unacceptable degree.

"This widespread acceptance of fluoridation as an effective means to prevent dental caries has led to the controlled fluoridation of the water supplies in over 4,800 communities in the United States and these communities include most of the large cities in the nation. There are presently about 100 million people in this country consuming water having a fluoride content between .7 ppm and 1.5 ppm. In Minnesota over 90% of the more than 650 communities having a municipal water supply have fluoridated the same. * * * A substantial majority of the citizens of this state presently drink fluoridated water and most of this majority have been doing so for more than 15 years.

"Fluoridation of public water supplies has been advocated or recommended by more than forty national professional and scientific organizations including the American Medical Association, American Dental Association, American Institute of Nutrition, American Association for the Advancement of Science, American Association of Dental Schools, American Cancer Society and many others of like standing and repute. Fluoridation now has and for many years has had the enthusiastic endorsement and support of the U. S. Public Health Service."

At least in part because of this endorsement by the scientific community, the Minnesota Legislature enacted Minn. St. 144.145 requiring the fluoridation of all public water supplied. Appellants argue, though, that fluoridation presents a serious health hazard and calls to our attention certian scientific studies which indicate the dangers of

fluoridation. However, it is not this court's function, at least in the absence of overwhelming evidence to the contrary, to second-guess the scientific accuracy of a legislative determination of fact. Nor is it within our province to determine the wisdom of or necessity for a legislative enactment. As we said in Beck v. Groe, 245 Minn. 28, 40, 70 N.W. 2d 886, 895 (1955):

> "The legislature is in the first instance the judge of what is necessary for the public welfare. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. Courts cannot pass on the soundness or expediency of theories embodied in statutes enacted in the exercise of the police power for the social benefit of the citizen and the public welfare. The control, regulation, and restrictions to be imposed, to attain, so far as may be, results consistent with the public welfare, are purely of legislative cognizance. The legislative determination of the control to be applied is final, except when so arbitrary as to be violative of the constitutional rights of the citizen."

In enacting the fluoridation law, the legislature relied on the overwhelming weight of scientific opinion that fluoridation afforded a safe and effective means of reducing dental caries. We cannot say that this legislative determination is so clearly erroneous as to be arbitrary and violative of due process. State v. Edwards, 287 Minn. 83, 87, 177 N.W. 2d 40, 43 (1970). In fact, the state courts have been unanimous in holding fluoridation to be a proper exercise of the state's police power. See, Graybeal v. McNevin, 439

S.W. 2d 323 (Ky. 1969); Opinion of the Justices, 243 A. 2d 716 (Del. 1968); Attaya v. Town of Gonzales, 192 So. 2d 188 (Ct. App. La. 1966); Paduano v. City of New York, 45 Misc. 2d 718, 257 N.Y.S. 2d 531, affirmed, 24 App. Div. 2d 437, 260 N.Y.S. 2d 831 (1965), affirmed, 17 N.Y. 2d 875, 218 N.E. 2d 339, 271 N.Y.S. 2d 305 (1966), certiorai denied, 385 U.S. 1026, 87 S. Ct. 754, 17 L. ed 2d 674 (1967); Hall v. Bates, 247 S.C. 511, 148 S.E. 2d 345 (1966); Wilson v. City of Mountlake Terrace, 69 Wash. 2d 148, 417 P. 2d 632 (1966); Rogowski v. City of Detroit, 374 Mich. 408, 132 N.W. 2d 16 (1965); Schuringa v. City of Chicago, 300 Ill. 2d 504, 198 N.E. 2d 326 (1964), certiorari denied, 379 U.S. 964, 85 S. Ct. 655, 13 L. ed. 2d 558 (1965); Stroupe v. Eller, 262 N.C. 573, 138 S.E. 2d 240 (1964); City Commission of Fort Pierce v. State ex rel. Altenhoff, 143 So. 2d 879 (Ct. App. Fla. 1962), appeal dismissed, 154 So. 2d 208 (Ct. App. Fla. 1963); Wilson v. City of Council Bluffs, 253 Iowa 162, 110 N.W. 2d 569 (1961); Readey v. St. Louis County Water Co., 352 S.W. 2d 622 (Mo. 1961), appeal dismissed, 371 U.S. 8,83 S. Ct. 20, 9 L. ed. 2d 47 (1962); Birnel v. Town of Fircrest, 53 Wash. 2d 830, 335 P. 2d 819 (1959), appeal dismissed, 361 U.S. 10,80 S. Ct. 71, 4 L. ed. 2d 51 (1959). Teeter v. Municipal City of LaPorte, 236 Ind. 146, 139 N.E. 2d 158 (1956); Baer v. City of Bend, 206 Ore. 221, 292 P. 2d 134 (1956); Kraus v. City of Cleveland, 163 Ohio St. 559, 127 N.E. 2d 609 (1955), appeal dismissed, 351 U.S. 935, 76 S. Ct. 833, 100 L. ed. 1463 (1956); Kaul v. City of Chehalis, 45 Wash. 2d 616, 277 P. 2d 352 (1955); Froncek v. City of Milwaukee, 269 Wis. 276, 69 N.W. 2d 242 (1955); Chapman v. City of Shreveport, 225 La. 859, 74

So. 2d 142 (1954), appeal dismissed, 348 U.S. 892,75 S. Ct. 216, 99 L. ed. 701 (1954); DeAryan v. Butler, 119 Cal App. 2d 674, 260 P. 2d 98 (1953), certiorari denied, 347 U.S. 1012,74 S. Ct. 863, 98 L. ed. 1135 (1954); Dowell v. City of Tulsa, 273 P. 2d 859, 43 A.L.R. 2d 445 (Okla. 1954), certiorari denied, 348 U.S. 912, 75 S. Ct. 292, 99 L. ed. 715 (1955). Therefore, for purposes of this decision, we must accept as factual the legislative determination that fluoride is a safe and effective means of reducing dental caries.

Appellants proceed to argue, however, that "the question is not whether fluoridation may be good, but whether the people have a constitutional prerogative to refuse." (Italics omitted.) Appellants contend that there is such a prerogative which derives from the constitutional right of privacy.[2]

While the constitution does not explicitly mention any right of privacy, the United States Supreme Court has recognized, in varying contexts, a constitutional right of personal privacy. This right of pricacy has been found in the First Amendment (Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247, 22 L. ed. 2d 542, 549 [1969]); in the Fourth and Fifth Amendments (Terry v. Ohio, 392 U.S. 1, 8,88 S. Ct. 1868, 1873, 20 L. ed. 2d 889, 898 '1968]; Katz v. United States, 389 U.S. 347, 350, 88 S. Ct. 507, 510, 19 L. ed. 2d 576, 581 [1967]; and Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. ed. 746

[2]Appellants also argue that Brainerd itself has a constitutional right to community privacy. Appellants, however, have not cited for us any authority to support the proposition that a community has a constitutional right of privacy. Whatever privacy rights Brainerd has in this matter must derive from the individual constitutional rights of its citizens.

[1886]; in the penumbras of the Bill of Rights (Griswold v. Connecticut, 381 U.S. 479, 484, 85 S. Ct. 1678, 1681, 14 L. ed. 2d 510, 514 [1965]); in the Ninth Amendment, (Griswold v. Connecticut, 381 U.S. 479, 486, 85 S. Ct. 1678, 1682, 14 L. ed. 2d 510, 516 [Goldberg, J., concurring]); and in the concept of liberty guaranteed by the Fourteenth Amendment (Meyer v. Nebraska, 262 U.S. 390, 399,43 S. Ct. 625, 626, 67 L. ed. 1042, 1045 [1923]. In Roe v. Wade, 410 U.S. 113, 152 93 S. Ct. 705, 726, 35 L. ed. 2d 147, 176 (1973), the Supreme Court concluded:

> "* * * These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy."

At the core of the privacy decisions, in our judgment, is the concept of personal autonomy—the notion that the constitution reserves to the individual, free of governmental intrusion, certain fundamental personal decisions about how he or she will conduct his or her life. See, Price v. Sheppard, 239 N.W. 2d 905, filed February 20, 1976. Thus, in Eisenstadt v. Baird, 405 D.S. 438, 453, 92 S. Ct. 1029, 1038, 31 L. ed. 2d 349, 362 (1972), the Supreme Court held that the right of privacy protects an individual's right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear of beget a child"; and, in Roe v. Wade, supra, the court held that the right of privacy protects an individual's right to decide "whether or not

to terminate her pregnancy." 410 U.S. 153, 93 S. Ct. 727, 35 L. ed 2d 177.

While the United States Supreme Court has never so held, the right of personal privacy could also extend to protect an individual's decision regarding what he will or will not ingest into his body. Indeed, this concept of bodily integrity is rooted in common law. As the Supreme Court stated in Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251, 11 S. Ct. 1000, 1001, 35 L. ed. 734, 737 (1891):

> 'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Whether one's right to bodily integrity is designated a right of personal privacy or not, though, does not alter our conclusion that the right, like other constitutional rights, is not absolute. As the Supreme Court held in Roe v. Wade (410 U.S. 154, 93 S. Ct. 727, 35 L. ed. 2d 177):

> "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."

And in specific reference to an individual's right of bodily integrity, the court stated in Breithaup v. Abram, 353 U.S. 432, 439, 77 S. Ct. 408, 412, 1 L. ed. 2d 448, 453 (1957):

> "As against the right of an individual that his per-

son be held inviolable * * * must be set the interests of society * * *."

Thus, in Schmerber v. California, 384 U.S. 757, 768, 86 S. Ct. 1826, 1834, 16 L. ed. 2d 908, 918 (1966), a case involving a governmental intrusion into an individual's body for blood to be analyzed for alcohol content, the Supreme Court concluded that the constitution does not protect an individual "against all intrustions" but only "against intrusions which are not justified in the circumstances, or which are made in an improper manner."

Therefore, to properly determine the constitutionality of fluoridation, we must consider (1) the importance of the state's purpose for requiring fluoridation; (2) the nature and magnitude of the effect of forced fluoridation on the individual; (3) whether the state's purpose justifies the intrusion of forced fluoridation; and (4) whether the means adopted by the state to accomplish its purpose is proper and reasonable.

It seems clear that the state has a substantial interest in fluoridating the public drinking water to prevent tooth decay.

> "Although not a contagious disease, dental caries, or tooth decay, presently constitutes one of the most challenging health problems in the United States. By the time they reach adulthood, some ninety-nine percent of the American population has had some experience with dental caries. Half of the population over fifty-five have no natural teeth at all. Compounding this problem of dental health is the great shortage of dentists, dental hygienists, and dental assistants. It

> has been estimated that approximately one-third of the population sees a dentist annually, and eighteen percent has never seen a dentist. A billion dental manhours would have been required in 1962 just to handle the then current backlog of dental problems. The dental manpower currently available cannot physically provide for more than half of the existing dental needs." Farrer, Fluoridation: Compulsory Medication of Municipal Water Supplies?, 5 Urban Lawyer 504.[3]

Aside from this enormous drain on health facilities, the state has a direct interest in maintaining public health. The health of one's children[4] is not exclusively a personal or individual concern. The Supreme Court of Louisiana stated:

> "The health of the children of a community is of vital interest and of grave importance to all the inhabitants of the community. Their health and physical well-being is of great concern to all the people, and any legislation to retard or to reduce disease in their midst cannot and should not be opposed on the ground that it has no reasonable relation to the general health and welfare." Chapman v. City of Shreveport, 225 La. 859, 870, 74 So. 2d 142, 145, appeal dismissed, 348 U.S. 892, 75 S. Ct. 216, 99 L. ed. 701 (1954).

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[3]See, also, Clark & Sophy, *Fluoridation: The Courts and the Opposition*, 13 Wayne L. Rev. 338 (1966).

[4]Fluoridation has its most beneficial effect upon individuals who have consumer fluoridated water from infancy to the age of 10 or 12 years. See, the excerpt from the trial court's memorandum in MOFF v. City of Brainerd and Minnesota State Board of Health, quoted above.

We next consider the nature and magnitude of the effect of fluoridation on the individual. While forced fluoridation does intrude on an individual's decision whether or not to ingest fluoride, the impact of this intrusion on an individual's life is negligible. This becomes particularly evident when compared to the impact involved in the Supreme Court's privacy decisions such as in Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. ed. 2d 510: Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L ed. 2d 349, and Roe v. Wade, 410 U.S. 113, 93 S. Ct 705, 35 L. ed. 2d 147, where the state's intrusion had the impact of depriving the individual of his or her freedom to decide whether or not to have children. While forced fluoridation does, to a limited extent, infringe upon an individual's freedom to decide whether he will or will not ingest fluoride, such an infringement, absent any significant adverse consequences to the individual, cannot be accorded substantial weight. The difficulty with according weight to such a prerogative in a case of this type is that if fully recognized it would confer upon the individual the prerogative to refuse to allow the government to chlorinate the water or to take similar actions which it has determined to be in the best interests of public health. Such an unbalanced allocation of decision-making authority is unacceptable. In Roe v. Wade, 410 U.S. 113, 154, 93 S. Ct. 705, 727, 35 L. ed. 2d 147, 177, the Supreme Court indicated that it has consistently "refused to recognize an unlimited right [to do with one's body as one pleases]."

Appellants contend that the intrusion is not justified based on Jacobson v. Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. ed. 643 (1905), in which the United States Supreme Court upheld compulsory vaccination in the face

of a threatened smallpox epidemic as a valid exercise of police power. Appellants insist that compulsory-medication, that is, intrusion into an individual's bodily integrity, was allowed in Jacobson only because of the great danger to the public welfare posed by the contagious disease of smallpox. We note, however, that the court in Jacobson, quoting Crowley v. Christensen, 137 U.S. 86, 89, 11 S. Ct. 13, 15, 34 L. ed. 620, 621 (1890), stated the governing principle in broad terms (197 U.S. 26, 25 S. Ct. 361 49 L. ed. 650):

> " ' * * *The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.' "

Upon balancing the substantial public health benefit of fluoridation against its innocuous effect on the individual, we have concluded that fluoridation is a justified intrusion into an individual's bodily integrity. As the Illinois Supreme Court stated in Schuringa v. City of Chicago, 30 Ill. 2d 504, 518, 198 N.E. 326, 334 (1964):

> "* * * [Fluoridation programs, even if considered to be medication in the true sense of the word, are so necessarily and reasonably related to the common good that the rights of the individual must give way."

Finally, we must determine whether the means of achieving the state's purpose is proper and reasonable. After careful consideration, we have concluded that the means adopted by the state to accomplish its purpose in

the instant case is not particularly offensive or unusual. Although the actual consumption of water is, in a sense, a private and personal act, the preparation and treatment of that water is a common and accepted public function. In fact, there are numerous governmental regulations controlling the ingredients in the food we eat. Such quality-control measures are inherent in a technologically advanced society and do not ordinarily affront a person's sensibilities.

The public health of all the state's citizens, involving as it does a social condition, is a distinctly legislative concern. The Minnesota Legislature has determined that the health, welfare, and safety of the public is best served by providing fluoride through the public drinking water. While we have great respect for the strong and sincerely held opinion of many of the citizens of Brainerd,[5] we reiterate that it is not this court's function, absent a clear violation of constitutional rights, to reconsider the wisdom or necessity of a legislative decision. Therefore, after careful consideration, we find the Minnesota Fluoridation Law, Minn. St. 144.145, to be constitutional.

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[5]While we agree that Brainerd's "constitutional convention" was an eloquent way for the people of Brainerd to express their feelings on the subject of fluoridation, we do not recognize the resolutions of that convention as binding authority on the constitutionality of the fluoridation law. Authority to determine the constitutionality of laws resides in the judiciary. As the United States Supreme Court recently stated in United States v. Nixon, 419 U. S. 683, 703, 94 S. Ct. 3090, 3105, 41 L. ed. 2d 1039, 1061 (1974): "* * * Many decisions of this Court * * * have unequivocally reaffirmed the holding of *Marbury* v. *Madison* * * * that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" This is an indispensable feature of our constitutional system. To the extent that appellants' claim urges that final authority to interpret the law does not reside with the courts, it must be rejected. "* * * To yield to such a claim would be to enthrone official lawlessness, and lawlessness if not checked is the precursor of anarchy." Cooper v. Aaron, 358 U. S. 1, 22, 78 S. Ct. 1401, 1412, 3 L. ed. 2d 19, 20 (1958).

4. Appellant city finally argues that it is entitled to an administrative due process hearing before it can be required to fluoridate its water supply. The purpose of such a hearing would be to determine the effect of fluoridation on Brainerd's water filtration system. Appellant has alleged that fluoridation would upset the delicate chemical balance of its unique filtration system and cause a dangerous accumulation of sludge in the city's pipes. However, the fact that fluoridation would require the city of Brainerd to incur expense in remedying, or even replacing, its present filtration system does not afford it a constitutional right to a due process hearing. As a governmental subdivision, the city of Brainerd is not a "person" for purposes of the due process clause and therefore has no constitutional right to a due process hearing before being deprived of property. Independent School Dist. No. 581 v. Mattheis, 275 Minn. 383, 147 N.W. 2d 374 (1966); see, also, Waters v. Putnam, 289 Minn. 165, 183 N.W. 2d 545 (1971). This is because a "municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the legislature." Williams v. Eggleston, 170 U.S. 304, 310, 18 S. Ct. 617, 619, 42 L. ed. 1047, 1049 (1898).

The order of the trial court is affirmed.

YETKA, Justice (dissenting).

I dissent. To me it is essential to bear in mind that, unlike the vaccination cases, we are not asked to decide the constitutionality of a law which *directly* imposes fluoridation on an unwilling individual. Rather, Minn. St. 144.145 does so only *indirectly* by requiring municipalities to fluor-

idate their water supplies for the purpose of making available publicly-funded fluoride treatment. Presumably those opposed to fluoridation are free to obtain nonfluoridated water from other sources, however impractical and unlikely that may be. Moreover, the law, by its terms falls short of reaching a large number of our population who draw their water from private wells. Undoubtedly were the law otherwise, e. g., compulsory periodic dental application of fluoride for all children, the decision reached by the majority would have been arrived at with greater difficulty.

Equally important, in my judgment, is the distinction between the chlorination of a public water supply and fluoridation. The purpose of the former is to ensure the safety of a water supply for public consumption; the purpose of the latter is to treat individual dental health problems.

The majority concedes that a substantial constitutional right is involved, but that the state's intrusion or infringement upon that right is justified when its interest is balanced against that of the individual. It was my understanding in Price v. Sheppard, 239 N.W. 2d 905, filed February 20, 1976, cited in the majority opinion, that even if the state's intrusion is justified. it is not unlimited. In addition "[i]t must appear that the means utilized to serve the state's interest are necessary and reasonable, or, in other words, in light of alternative means the least intrusive." 239 N.W. 2d at 910. I assume this is also what the majority has in mind in assessing the reasonableness of the means chosen by the legislature in enacting Minn. St. 144.145.

Contrary to the conclusion of the majority, it seems to me that in the city of Brainerd, where an overwhelming majority of those participating in a voter referendum indicated their opposition to fluoridation, less intrusive means could and should have been utilized. In fact, the infringement of the sights of the majority could have been avoided altogether. The state's purpose was to make available publicly-funded fluoride treatment, not to impose it directly on individuals. It chose what it obviously considered to be the most efficient means. But it could have achieved that same purpose by compelling the city of furnish fluorine tablets or dental application to those who wished it, without infringing on the rights of the majority. Moreover, it is my understanding from the record that Brainerd is willing to provide fluoride in such an alternative fashion to those who wish it.

Moreover, it must be remembered that while fluoridating a water supply may be an efficient means of achieving the state's purpose, it is apparently not the most economical method in Brainerd. Carl Zapffe, Ph. D., a scientist specializing in chemistry, physics and metallurgical engineering, averred in an affidavit that there was a "strong likelihood" that the "complicated and delicate chemical balance" in the Brainerd water filtration system "due to the excessive presence of manganese and iron oxides dissolved in the natural water" could be destroyed by the addition of fluoride in the amounts proposed by the state.

There has also been some evidence presented in the case that fluorine might be a carcinogen. I must say that the evidence presented was very weak and could have been more decisive in this case, but this court ought to take

judicial notice of the fact that scientists are finding every day that additives, chemical and otherwise, of all sorts are seriously suspect in the rising rate of cancer in the United States. When there is not a showing of a great overriding state interest and fluorine is readily available for those who want it by other means, why shouldn't the wishes and the rights of the local citizens, whether individually or as a group, be respected and be paramount?

There must be a point at which state action must yield to the asserted rights of the individual. I believe that this point has clearly been reached in this case. Central to our notion of democracy is the respect for the rights and wishes of the majority. Here the infringement of the majority's rights can be avoided without defeating the legislative purpose of the Minnesota Fluoridation Law.

For these reasons I must respectfully dissent.

MR. JUSTICE OTIS took no part in the consideration or decision of this case.

APPENDIX II

MINNESOTA STATUTES, SECTION 144.145
(Chapter 603 of Minnesota Laws of 1967)

For the purpose of promoting public health through prevention of tooth, decay, the person, firm, corporation, or municipality having jurisdiction over a municipal water supply, whether publicly or privately owned or operated, shall control the quantities of fluoride in the water so as to maintain a fluoride content prescribed by the state board of health. In the manner provided by law, the state board of health shall promulgate rules and regulations relating to the fluoridation of public water supplies which shall include, but not be limited to the following: (1) The means by which fluoride is controlled; (2) the methods of testing the fluoride content; and (3) the records to be kept relating to fluoridation. The state board of health shall enforce the provisions of this section. In so doing it shall require the fluoridafion of water in all municipal water supplies on or before January 1, 1970. The state board of health shall not require the fluoridation of water in any municipal water supply where such water supply in the state of nature contains sufficient fluorides to conform with the rules and regulations of such Board.

PUBLIC HEALTH REGULATION MHD-112(b), now MHD-138 FLUORIDATION. This regulation shall be applicable to all municipal water supplies, as required by Minnesota Statutes, Chapter 603, Section 1, 144.145.

(1) The fluoride content of the water shall be controlled to maintain an average concentration of 1.2 milligrams per liter; the concentration shall be neither less than

0.9 milligrams per liter nor more than 1.5 milligrams per liter.

(2) The chemical feeder apparatus for introducing fluoride to the water supply shall conform to the standards of the Board.

(3) Equipment for the adequate and reliable testing of the fluoride content shall be furnished for each installation. The method of testing the fluoride content of the water shall be approved by the Board. Approval shall require either a photometric colorimetric procedure, preceded when necessary by distillation or other treatment to remove interfering materials, or a fluoride-specific electrode and an associated potential measuring device. Continuous monitoring systems shall be approved when they can be installed to monitor a representative portion of the entire supply.

(4) Samples shall be collected daily at a point(s) in the distribution system representative of the entire supply. Sampling point(s) shall be located downstream sufficiently distant from the point(s) at which fluoride is fed into the water supply to ensure that the distance traversed and the time elapsed since the introduction of the fluoride concentrate is adequate to allow its complete mixing with the water. At lease once each 3 months, at a time designated by the Board, a duplicate of the usual daily sample(s) shall be collected in containers furnished by the Board and sent to the Department of Health for comparative analysis.

(5) Daily records of water fluoridation plant operations shall be maintained by the owners, officials, or their representatives. These records shall show the amount of water

pumped, amount of fluoride chemical fed, fluoride test results, and any other pertinent information required by the Board.

(6) A report of the operation of each water fluoridation plant shall be submitted monthly to the Board on forms furnished by them.

APPENDIX III

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT

St. Paul, Minn.
May 4, 1976

Minnesota State Board of Health, by
Warren R. Lawson, M.D., petitioner,

Respondent,

vs. 45644

City of Brainerd,

Appellants.

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,
JOHN McCARTHY
Clerk Supreme Court

APPENDIX IV

(Title of Cause.)

ORDER

Upon the application of counsel for the appellants and the answer filed in opposition thereto,

IT IS ORDERED that all proceedings be and hereby are stayed until the United States Supreme Court denies review or, assuming they grant review, makes a final determination on the merits.

Counsel have orally stipulated to waive any bond or security required by the rules of the United States Supreme Court in conjunction with this stay.

Dated: May 11, 1976.

BY THE COURT

/s/ HARRY H. MacLAUGHLIN
Associate Justice

APPENDIX V

(Title of Cause.)

TRANSCRIPT OF JUDGMENT

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the orders of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Crow Wing be and the same hereby is in all things affirmed.

Dated and Signed May 20, 1976.

BY THE COURT.
JOHN McCARTHY
Clerk

STATE OF MINNESOTA

ss

SUPREME COURT

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry Judgment in the case therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul May 20, 1976.

JOHN McCARTHY
Clerk
By /s/ WAYNE TSCHIMPERLE
Deputy

APPENDIX VI

(Title of Cause.)

NOTICE OF APPEAL

No. 45644

To Hon. Warren Spannaus, Attorney General of Minnesota; Richard B. Allyn, Esq., Solicitor General of Min-

nesota; Richard A. Wexler, Esq., Assistant Attorney general for the Minnesota State Board of Health—

Gentlemen: You will please take notice that the City of Brainerd et al. hereby take an Appeal pursuant to Title 28, United States Code, Section 1257 (2), to the United States Supreme Court from the final Judgment of this Court filed herein on the 20th day of May, 1976.

Dated this 21st day of May, 1976.

/s/ JOHN REMINGTON GRAHAM
For and on behalf of
JOHN REMINGTON GRAHAM
Hamline University School of Law
St. Paul, Minnesota 55104

D. A. LARSON
Office of the City Attorney
Brainerd, Minnesota 56401
Counsel for Appellants

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA
COUNTY OF RAMSEY

Your Affiant, JOHN REMINGTON GRAHAM, on solemn affirmation, deposes and says that pursuant to Rule 33 of the Rules of the United States Supreme Court, he has served copies of the attached Notice of Appeal upon Hon. Warren Spannaus, Attorney General of Minnesota; Richard B. Allyn, Esq., Solicitor General of Minnesota; and Richard A. Wexler, Esq., Assistant Attorney General for the Min-

nesota State Board of Health, by United States mail on this 21st day of May, 1976.

/s/ JOHN REMINGTON GRAHAM

Solemnly affirmed before me this 21 day of May, 1976.

/s/ CATHERINE MANGAN WILFAHRT
Notary public
Ramsey County, Minn.

My Commission Expires Mar. 26, 1982.

JOHN REMINGTON GRAHAM
Counselor at Law

Hamline University Law School
St. Paul, Minnesota 55104
May 21, 1976

John McCarthy, Esq.
Clerk of Supreme Court
State Capitol Building
St. Paul, Minnesota 55101

Re: State Board v. Brainerd, No 45644

Dear Sir:

I enclose herewith for filing our notice of appeal in the above entitled matter, together with our proof of service thereof on opposing counsel.

You may disregard earlier communications from me in this particular.

At a later date, I shall request that the record be certified and transmitted to the Clerk of the United States Supreme Court.

Thanking you for your attention, I am

Respectfully yours,

/s/ JOHN REMINGTON GRAHAM

Supreme Court, U. S.
FILED
AUG 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1976

No. 76-32

CITY OF BRAINERD, ET AL.,

Appellants,

vs.

MINNESOTA STATE BOARD OF HEALTH
BY WARREN R. LAWSON, M. D.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO AFFIRM AND ALTERNATIVE MOTION TO DISMISS WITH SUPPORTING BRIEF BY APPELLEE

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IN THE

Supreme Court of the United States

October Term 1976

No. 76-32

CITY OF BRAINERD, ET AL.,

Appellants,

vs.

MINNESOTA STATE BOARD OF HEALTH
BY WARREN R. LAWSON, M. D.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO AFFIRM AND ALTERNATIVE MOTION TO DISMISS WITH SUPPORTING BRIEF BY APPELLEE

MOTION TO AFFIRM AND ALTERNATIVE MOTION TO DISMISS

Minnesota State Board of Health by Warren R. Lawson, M. D., Appellee in the above-entitled cause, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the Supreme Court of Minnesota in the above captioned matter be affirmed and, in the alternative, that the appeal herein be dismissed on the ground that the question presented is so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

With three major exceptions, Appellee Minnesota State Board of Health (hereinafter the "Board") adopts as substantially correct the procedural history contained in the Jurisdictional Statement[1] of Appellant City of Brainerd (hereinafter "Brainerd"). First, the Board takes exception to Brainerd's repeated reference to a special fluoridation election and a meeting called the "Brainerd Convention," held in Brainerd, Minnesota, on July 5, 1974. While such an election and meeting did indeed occur, the Board denies that they have any relevance to the instant appeal. Accordingly, their effect is not addressed at length herein.[2]

Second, Brainerd incorrectly asserts that the issues in *MOFF v. State Board of Health and Brainerd*[3] were limited to whether or not Minn. Stat. §144.145 (1974) (hereinafter the "fluoridation law") was an unlawful exercise of the state police power. Directly in issue and decided against plaintiff

---

[1] Brainerd's Jurisdictional Statement at 5-10 (hereinafter "J.S. at —").

[2] The Minnesota Supreme Court dismissed the Brainerd "constitutional convention" as legally insignificant. Minnesota State Board of Health v. The City of Brainerd, —— Minn. ——, 241 N.W.2d 624, 633 (footnote 5) (1976).

[3] Minnesota District Court, Crow Wing County, No. 37168, Aug. 30, 1973. In this case plaintiff, Minnesotans Opposed to Forced Fluoridation, a non profit corporation consisting of many Brainerd citizens sought an injunction against defendants from enforcing and implementing the fluoridation law and a declaration that it was unconstitutional and that fluoridation constituted pollution.

was the question of whether or not the fluoridation law violated plaintiff's right to privacy.[4]

Finally, Brainerd claims that the majority of the Supreme Court of Minnesota held that a substantial federal question of constitutional privacy was involved. Nowhere in the decision did the majority say the federal question was substantial. To the contrary, the majority stated that "such an infringement, absent any significant adverse consequences to the individual, cannot be accorded substantial weight." *Minnesota State Board of Health v. The City of Brainerd,* —— Minn. ——, ——, 241 N.W.2d 624, 632 (1976).

---

[4] In dismissing this claim the District Court stated:

> However, plaintiff claims . . . that fluoridation constitutes an 'invasion of the right to privacy which is within the penumbra of the Ninth Amendment' to the U.S. Constitution and cites Griswold v. Connecticut, 381 U.S. 479, as authority for such proposition. . . . In the present case, I am not disposed to find M.S. Sec. 144.145 unconstitutional on the basis of Griswold for two reasons: first, I am uncertain as to the precise aspect of the right of privacy which is here involved; and, secondly, it is clear that whatever the precise aspect of the right of privacy may be in this case, it would require some extension or enlargement of the "penumbra" relied upon by the Court in Griswold. . . . Since the present case involves a matter of public health, it relates in my opinion to a social condition . . . and is thus one where even the U.S. Supreme Court would decline to determine the wisdom, need and propriety of the Minnesota legislature's enactment of M.S. 144.145. . . .

See Respondent's Brief and Appendix filed with the Minnesota Supreme Court at RA-20, RA-21.

ARGUMENT

BRAINERD'S APPEAL SHOULD BE DISMISSED AS NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Even though a state court has formally determined a federal question, the United States Supreme Court may nonetheless dismiss an appeal when the question is not substantial. Supreme Court Rule 16(1)(b); *Honeyman v. Hanan*, 300 U.S. 14 (1937); *Zucht v. King*, 260 U.S. 176 (1922). Therefore, the fact *per se* that a federal question was raised and decided in the state court, as was true here, is not determinative. While the Board agrees with Brainerd that a substantial federal question exists only when the issue is consequential, difficult, and not clearly resolved by the established precedents of this Court, contrary to Brainerd's assertion, the issues of this case have been clearly resolved by the established precedents of this Court. Therefore, the Board moves the affirmance of the decision of the Minnesota Supreme Court or dismissal of Brainerd's appeal.

A. This court has repeatedly ruled in fluoridation cases raising every claim of unconstitutionality here asserted that this health measure presents no substantial federal question.

Fluoridation has been practiced in the United States as a public health measure for approximately thirty years with about 100 million people in the United States presently consuming municipally fluoridated water. During this period, the constitutionality of fluoridation has been repeatedly chal-

lenged. Both state and federal courts have rejected these attacks with complete unanimity.[5]

Of the eleven cases where the United States Supreme Court declined to review state supreme court decisions upholding the constitutionality of fluoridation, five were direct appeals dismissed for want of a substantial federal question. *City of Canton v. Whitman*, 44 Ohio St.2d 62 (1975), *appeal dismissed*, 96 S.Ct. 1735 (U.S. 1976), *Readey v. St. Louis County Water Co.*, 352 S.W.2d 622 (Mo. 1961), *appeal dismissed*, 371 U.S. 8 (1962); *Birnel v. Town of Fircrest*, 53 Wash.2d 830, 335 P.2d 819 (1959), *appeal dismissed*, 361 U.S. 10 (1959); *Kraus v. City of Cleveland*, 163 Ohio 559, 127 N.E.2d 609 (1955), *appeal dismissed*, 351 U.S. 935 (1956); *Chapman v. City of Shreveport*, 225 La. 859, 74 So.2d 142 (1954), *appeal dismissed*, 348 U.S. 892 (1954). The dismissals in these cases are decisions on the merits. *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311, 315 (1902). In these cases, every claim of unconstitutionality asserted by Brainerd was presented to this Court. Appellants in *Chapman*, *Kraus*, and *Birnel*, *supra*,

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[5] The cases for which review by this Court either by direct appeal or by writ of certiorari have not been sought are:
Graybeal v. McNevin, 439 S.W.2d 323 (Ky. 1969); Opinion of the Justices, 243 A.2d 716 (Del. 1968); Crawford v. City of Detroit, 389 F.2d 1001 (6th Cir. 1968); Attaya v. Town of Gonzales, 192 So.2d 188 (Ct. App. La. 1966); Hall v. Bates, 247 S.C. 511, 148 S.E.2d 345 (1966); Wilson v. City of Mountlake Terrace, 69 Wash. 2d 148, 417 P.2d 632 (1966); Miller v. City of Evansville, 247 Ind. 563, 219 N.E.2d 900 (1966); Rogowski v. City of Detroit, 374 Mich. 408, 132 N.W.2d 16 (1965); Stroupe v. Eller, 362 N.C. 573, 138 S.E.2d 240 (1964); City Commission of Fort Pierce v. State ex rel. Altenhoff, 143 So.2d 879 (Ct. App. Fa. 1962), appeal dismissed, 154 So.2d 208 (Ct. App. Fla. 1963); Wilson v. City of Council Bluffs, 253 Iowa 162, 110 N.W.2d 569 (1961); Teeter v. Municipal City of LaPorte, 236 Ind. 146, 139 N.E.2d 158 (1956); Baer v. City of Bend, 206 Or. 221, 292 P.2d 134 (1956); Kaul v. City of Chehalis, 45 Wash. 2d 616, 277 P.2d 352 (1955); Froncek v. City of Milwaukee, 269 Wis. 276, 69 N.W.2d 242 (1955).

alleged *inter alia* that fluoridation of municipal water supplies was unconstitutional because (a) it constitutes compulsory medication;[6] (b) it is or may be harmful to health;[7] (c) it is directed against a noncontagious disease;[8] and (d) allegedly alternative methods of administering fluoride to children are available.[9] In the instant matter Brainerd argues that fluoridation violates the right of its citizens to personal privacy and bodily integrity in contravention of the Fourteenth Amendment of the United States Constitution. However, Brainerd's argument is simply a rewording of the compulsory medication and related arguments listed above which this Court has found in *Birnel, Kraus* and *Chapman, supra,* do not constitute a substantial federal question.

In addition, this court denied certiorari in six cases wherein the constitutionality of fluoridation was upheld by highest state courts. *City of Canton v. Whitman, supra; Alkire v. Cash-*

[6] See the jurisdictional statements of Chapman, pp. 4, 6-7; Kraus, pp. 4, 10; and Birnel, p. 4.

[7] See the jurisdictional statements of Chapman, pp. 4, 6; Kraus, p. 10; and Birnel, pp. 6-7.

[8] See the jurisdictional statements of Chapman, p. 4; Krause, p. 22; and Birnel, p. 10. With respect to this issue, the Supreme Court of the State of Michigan has stated:

> . . . It is true that the smallpox disease involved in [Jacobson v. Massachusetts, 197 U.S. 11 (1905)] is infectious or contagious while dental caries is not. Plaintiffs cite no cases to the effect that element is essential to the power of the State to adopt and enforce regulations designed to protect or improve public health. We conceive of no sound reason for so holding.

Rogowski v. City of Detroit, 374 Mich. 408, 423, 424, 132 N.W.2d 16, 24 (1965). Brainerd also fails to cite any cases supporting this contention. In fact Brainerd cites with approval Zucht v. King, 260 U.S. 174 (1922). Zucht involved a challenge to a compulsory vaccination law in which plaintiff alleged, *inter alia*, that there was *no occasion for requiring vaccination*. In other words, plaintiff claimed that under the existing circumstances vaccination was not necessary to prevent contagious disease. Defendants filed a general demur the effect of which is to admit all facts alleged by plaintiff. This Court found notwithstanding that the vaccination requirement was not needed that no substantial federal question was involved.

[9] See the jurisdictional statements of Kraus, p. 11, and Birnel, p. 7, 9.

man, 477 F.2d 598, *cert. denied,* 414 U.S. 858 (1973); *Paduano v. City of New York,* 45 Misc.2d 718, 257 N.Y.S.2d 531, *affirmed,* 24 App. Div.2d 437, 260 N.Y.S.2d 831 (1965), *affirmed,* 17 N.Y.2d 875, 218 N.E.2d 339, 271 N.Y.S.2d 305 (1966), *cert. denied,* 385 U.S. 1026 (1967); *Schuringa v. City of Chicago,* 300 Ill.2d 504, 198 N.E.2d 326 (1964), *cert. denied,* 379 U.S. 964 (1965); *DeAryan v. Butler,* 119 Cal. App.2d 674, 260 P.2d [illegible] (1953), *cert. denied,* 347 U.S. 1012 (1954); *Dowell v. City of Tulsa,* 273 P.2d 859 (Okla. 1954), *cert. denied,* 348 U.S. 912 (1955). The petitioners in these cases argued unsuccessfully every question of constitutionality raised by Brainerd. *Alkire* and *Paduano, supra,* directly raised the question of whether fluoridation violated the right to privacy.[10] By denying the writs of certiorari, this Court found in essence that the privacy question in the fluoridation context was insubstantial.[11]

As the foregoing dramatically demonstrates, Brainerd is totally and completely incorrect when it asserts that plaintiffs in these cases,

> . . . could not be heard to claim that the statute interferes with the inherent privacy rights of the individuals

[10] See pp. 2, 8-10 of Alkire's Petition for Writ of Certiorari. In Paduano the New York Court of Appeals held that the "fluoridation program does not constitute a significant invasion of fundamental rights." 18 N.Y.2d 721, 220 N.E.2d 803, 274 N.Y.S.2d 158 (1966). This issue was raised then in the Petition for a Writ of Certiorari, pp. 4, 6, 7, 13-23.

[11] The other questions raised by these cases were, with page references to the petitions for certiorari:

(1) Compulsory medication, Alkire, p. 8, Paduano, p. 3, Schuringa, pp. 2-3, DeAryan, p. 8, Dowell, pp. 2-3;

(2) Alleged dangers to health, Alkire, p. 8, Paduano, p. 3, Schuringa, pp. 2-3;

(3) Alleged want of power to act against non-contagious disease, Alkire, p. 8, Paduano, p. 3, Dowell, pp. 2-3;

(4) Alleged lock of power because of absence of a public emergency endangering health, Alkire, p. 8, Paduano, p. 4, Schuringa, pp. 2-3, Dowell, pp. 2-3.

(5) Alleged availability of other methods of protecting teeth, Alkire, pp. 8, 9; Paduano, p. 3.

> living in the community . . . [T]here is no standing to claim that the inherent privacy rights of individuals are violated by a statute, unless and until the statute is about to be enforced against an individual or group of individuals who expressly protest.[12]

Brainerd, seeking to somehow create grounds on which to distinguish its case from the unbroken line of decisions rejecting the relief they want, refers to the so-called "Brainerd convention." This meeting was allegedly a protest of the people which somehow gives Brainerd a special standing to present an issue not heretofore considered by this Court. The contention should be to no avail as the "convention" has no legal significance. In the privacy cases previously decided by this Court, the individual plaintiffs did not have to call a constitutional convention to protest the law in question in order to gain standing to challenge the law in court. The filing of a suit in itself constitutes the protest.

B. A substantial federal question is not raised by the Minnesota Supreme Court taking judicial notice of scientific data demonstrating the benefits and safety of water fluoridation.

Brainerd asserts that the Minnesota Supreme Court took judicial notice of scientific evidence demonstrating the safety and benefits of fluoridation while at the same time ignoring evidence to the contrary. Brainerd goes on to refer and even delineate much of this anti-fluoridation evidence in its Jurisdictional Statement.[13] It is plain that Brainerd, through extraordinary use of facts outside the record, is asking the Court

[12] J.S. at 12, 13.
[13] J.S. at 5, 17-24.

to perform a legislative function to decide between two competing philosophical beliefs and sets of data.[14]

The question of inconsistent scientific evidence should not be resolved in the United States Supreme Court. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Viemeister v. White*, 179 N.Y. 235, 72 N.E. 97 (1904).

> . . . The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good.
>
> It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. . . .
>
> A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts. . . .
>
> The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. *The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases.* In

[14] While the Board is aware of the existence of the data presented by Brainerd which it uses to support its position that fluoridation may be harmful, the Board denies its validity. Further, the great weight of medical opinion continues to grow in support of the benefits and safety of this proven public health measure.

> a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a republican form of government. . . .

Jacobson v. Massachusetts, supra, at 34, 35 (emphasis added).

This Court has unequivocally held that a court may take judicial notice of a common knowledge or belief, such as here, that fluoridation is beneficial to prevent dental caries and thus is a significantly important public health measure. The existence of those in society who hold a contrary opinion with respect to the benefit of fluoridation does not change this rule. It only establishes the fluoridation question as one to be determined legislatively, not judicially. The judicial notice question raised by Brainerd is not substantial nor is it even a federal question. It does not provide a basis for this Court to take jurisdiction of this case.

C. Prior decisions of this court support the conclusion that fluoridation does not violate the right to personal privacy.

Brainerd contends that the fluoridation law violates an inherent constitutional right of the people to privacy, health, freedom, and bodily integrity. As has been noted, *supra* at 7-8, this Court has rejected the claim that fluoridation violates these rights. That action is entirely consistent with the decisions of this Court, including those issued since the initial enunciation of the modern right to privacy doctrine in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In *Griswold, supra,* this Court declared unconstitutional a Connecticut state law which forbid the use of and the giving of advice with respect to the use of contraceptives. The statute was found to violate the right of "privacy and repose" which emanated from the penumbra of the Bill of Rights. In so doing, this Court did not declare that every law which intruded on an individual's life was invalid. Indeed, even the *Griswold* Court admitted that it was not a legislative body responsible for determining the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. *Id.* at 482. The Connecticut law, however, went beyond these legitimate areas of state concern and intruded into the sacred relationship of marriage.

Since *Griswold* this Court has continued to carve out a right of autonomy for the individual but in very limited areas all involving personal decisions which do not directly affect the public.[15] Thus, the right of privacy that exists under the Fourteenth Amendment includes:

> "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' *Palko v. Connecticut,* 302 U.S. 319, 325 (1937);" *Roe v. Wade,* 410 U.S. 113, 152 (1973). This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. cf. *Eisenstadt v. Baird,* 405 U.S. 438, 453-454 (1972); . . . *Stanley v. Georgia,* . . . [394 U.S. 557 (1969)]; *Loving v. Virginia,* 388 U.S. 1, 12 (1967); *Griswold v. Connecticut,* . . . [381 U.S. 479 (1965)]; *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942); *Pierce v. Society of Sisters,* 268 U.S. 510, 535

[15] Compare Stanley v. Georgia, 394 U.S. 557 (1969), with Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

(1925); and *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923).[16]

Paris Adult Theatre v. Slaton, 413 U.S. 49, 65, 66 (1973).

What Brainerd ignores is that most aspects of a person's life do not involve fundamental personal rights. In these instances the individual's liberty is subject to the police power of government, with presumptions of statutory validity and a heavy burden placed on that person who claims that a regulation has no conceivable public purpose or that there is no rational relation between means and ends. One such area where an individual must conform to the declarations of government and where no fundamental rights are involved is in public health measures. Fundamental to a strong and viable nation is a healthy people. In recognition, this Court has long preserved the right of state legislatures to enact reasonable laws to protect the public health, even if they do intrude upon an individual's bodily integrity. As stated in *Breithaupt v. Abram,* 352 U.S. 432, 439 (1957): "As against the right of an individual that his person be held inviolable . . . must be set the interests of society . . ."[17] Thus in *Schmerber v. California,* 384 U.S. 757 (1966), a case involving a governmental intrusion into an individual's body for blood to be analyzed

[16] The areas protected in these cases are marriage, contraception, miscegenation, sterilization, family relations, possession of obscene materials in one's own home, child rearing, and education.

[17] See also Roe v. Wade, 410 U.S. 113, 154 (1973) where the Court concluded that the right of personal privacy ". . . is not unqualified and must be considered against important state interests in regulation." The cases cited by Brainerd are inapposite. For example, Breese v. Smith, 501 P.2d 159 (Alas. 1972), and Ravin v. State of Alaska, 537 P.2d 494 (Alas. 1975) were both decided under provisions of the Alaska constitution, not the United States constitution. Union Pacific Railway Comp. v. Botsford, 141 U.S. 250 (1891), and Mohr v. Williams, 95 Minn. 265, 101 N.W. 12 (1905) do not involve the validity of state public health regulation but instead deal with rights between private parties.

for alcohol content, this Court concluded that the constitution does not protect an individual "against all intrusions," but only "against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Id.* at 768.

Other declarations of the Court are entirely consistent with these more recent statements. In *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), this Court upheld a compulsory vaccination law against the charge that it was

> unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person.

197 U.S. at 26. In response thereto, this Court stated:

> . . . [T]*he liberty secured by the Constitution of the United States to every person within its jurisdiction does not impart an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.* There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that

'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.' [Citations omitted.] In Crowley v. Christensen, 137 U.S. 86, 89, we said: *'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.* Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. 197 U.S. at 26, 27[18] (emphasis added).

As is clear from the above discussion, there is no conflict in the opinions of this Court. There exists a constitutional right of privacy or personal autonomy which is operative only when government attempts to intrude into areas of an individual's life which are uniquely personal and nonpublic. However, even here the right is not absolute and the government may regulate those aspects of life if compelling reasons exist. There are, in addition, other areas of an individual's life which may be subordinated to the interests of government for the public good. In these instances the right of privacy is not even in issue, and the only valid question is whether government has properly exercised its police power. Laws, such as Minnesota's fluoridation law, enacted in furtherance of the public health on the basis that fluoride will materially reduce the in-

[18] Jacobson is still good law. Roe v. Wade, *supra* at 154; Eisenstadt v. Baird, 405 U.S. 438, 454 (1972).

cidence of dental decay, an acknowledged serious health problem, fall into this latter category. The decision of the Minnesota Supreme Court in the instant action, being totally consistent with this Court's prior decisions, raises no issues to justify this Court noting jurisdiction of the case.

CONCLUSION

For the foregoing reasons, the Board urges this Court to affirm the decision of the Minnesota Supreme Court, or in the alternative, to dismiss Brainerd's appeal for want of a substantial federal question.

Respectfully submitted,

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